Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 160.

THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY *et al.*,

Plaintiffs in Error,

vs.

HENRY A. GARDNER,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

BRIEF FOR DEFENDANT IN ERROR.

Statement of Facts.

The Minnesota Western Railroad Company was incorporated by an act of the legislature of the Territory of Minnesota, approved March 3rd, 1853, entitled "*An act to incorporate the Minnesota Western Railroad Company*" (*Laws Minn. 1853, Chap. 66*). By this act Robert J. Walker and others were created a body corporate with the usual powers of private corporations, and were authorized to construct a railroad from some convenient point on Lake St. Croix or the St. Croix River to St. Paul and St. Anthony, and thence across the Mississippi River to the western boundary of the territory, with branches to the Red River and to the St. Louis River, if

deemed advisable. The act contained various immaterial provisions with reference to the organization and management of the company.

Unless by Section 20, which required the company to complete its road from the St. Croix to St. Paul within six years from the passage of the act, no duty was imposed either upon the company or its shareholders. Section 22 read as follows: "The legislature may at any time amend or alter this act." The act contained no provisions whatever with reference to the liability of shareholders (*See copy of Act at end Brief of Plaintiffs in Error on Motion to Dismiss or Affirm.*)

The Company thus incorporated took no steps toward the construction or operation of a railroad prior to the summer of 1870 (*Record, fol. 160*). In the meantime its constitution was several times altered in important particulars.

By an act approved February 26th, 1855, entitled "*A bill to amend an act entitled 'An act to incorporate the Minnesota Western Railroad Company'*" (*Laws Minn. 1855, Ch. 65*), the original act of incorporation was amended. To the names of the original corporators were added those of a number of other persons.

The eastern terminus of the road was fixed at Stillwater. The provision requiring the line from the St. Croix to St. Paul to be completed within six years was stricken out. The company, as thus reconstituted, was required to complete its road from Stillwater to St. Anthony within six years from the passage of this amendatory act.

In 1858 the State of Minnesota was admitted into the Union under its present constitution, which contained the following provision (*Art. 10, Sec. 3*), viz.:

"Each stockholder in any corporation shall be liable to the amount of stock held or owned by him."*

*This provision was amended in 1872 so as to read: "Each shareholder in any corporation (excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business), shall be liable to the amount of stock held or owned by him." The provision, as thus amended, remains a part of the constitution of the State.

A law providing a remedy to enforce the provision was already in existence in 1858 (*See Statutes Minnesota 1851, Chapter 77, Sections 6, 7, 1½ to 26*), and continued in force, after the admission of the Territory of Minnesota into the Union, until 1866, when it was re-enacted in a somewhat amended form by the State Legislature (*See Revised Statutes of Minnesota 1866, Chapter 76*) This statute has continued to exist in substantially the form in which it appeared in the revision of 1866 from the date of the adoption of that revision to the present time. This proceeding was instituted in accordance therewith (*See General Statutes Minnesota 1894, Chapter 76*).

By an act of the State Legislature approved March 5th, 1869, and entitled "*An act to amend an act entitled 'An act to incorporate the Minnesota Western Railroad Company', passed March third, one thousand eight hundred and fifty-three*" (*Special Laws Minn., 1869, Ch. 117*), the original act of incorporation of the Minnesota Western Railroad Company was amended so as to define the route of the proposed railway as follows: from Stillwater to St. Anthony; thence across the Mississippi River and via the city of Minneapolis, to a convenient point of junction with the Minnesota Valley Railroad or the Hastings & Dakota Railroad, or both, with a branch to the Red River, via Kandiyohi, and also to a point to be selected on the St. Louis River, if deemed desirable. Section 4 of the original act of incorporation was amended by designating Franklin Steele and others as the persons authorized to open books for receiving subscriptions to the capital stock and to prescribe a form of subscription. These persons were among those whose names had been added to the list of corporators by the act of 1855. This amendatory Act of 1869 included the following (*Section 3*): "That whenever the word 'Territory' occurs in said act [the original act of incorporation], except in Section one, the same be stricken out and the word 'State' inserted in lieu thereof." In Section One, proper, the word "territory" did not occur, but, of course, did occur in the enacting clause, which introduces that section. Section 4 of the Act of 1855, which required the construction of the road from Stillwater to St. Anthony by February 26th, 1861, was repealed. The names of F. R. Delano and others were added to the list of corporators, and the Minnesota Western Railroad Company, as thus again reconstituted, was required to *commence* the construction of its road within three years from the passage of the act; that is to say, by March 5th, 1872 (*See copy of Act reprinted as "Appendix A."*)

On February 4th, 1870, the Legislature passed an act entitled "*An act to amend an act entitled 'An act to incorporate the Minnesota Western Railroad Company, approved March third, one thousand eight hundred and fifty-three', and the acts amendatory thereof*" (*Special Laws, Minn., 1870, Ch. 57*). By this act authority was given to construct a branch line from the point of junction with the Minnesota Valley or the Hastings & Dakota Railroad to the north line of the State of

Iowa. That part of the Act of 1869 authorizing Franklin Steele and his associates to control the matter of stock subscriptions was repealed. The company was authorized to increase the number of its directors to twenty-five. An elaborate provision prescribed the manner in which the company should acquire its right of way. By Section 5 of this Act of 1870 the company was authorized to change its name by resolution of its Board of Directors. It was also authorized to issue preferred and special stock. Provisions were incorporated requiring the payment of a gross earnings tax, and exempting the road from other forms of taxation. This act also repealed Section 22 of the original Act of 1853, by which the legislature reserved the right to amend or alter the act of incorporation (*See copy of Act reprinted as "Appendix B"*).

Shortly after the passage of the Act of 1870 the Railroad Company changed its name to "Minneapolis and St. Louis Railway Company," and thereupon began the prosecution of its enterprise by the survey and location upon the ground of certain of the lines afterwards constructed by it. Prior to 1881 it had constructed and had begun to operate a number of lines of railway.

During the regular session of 1881, the legislature passed an act entitled "*An act to amend an act entitled 'an act to amend an act entitled an act to incorporate the Minnesota Western Railroad Company, approved March third (3rd), one thousand eight hundred and fifty three,' and the acts amendatory thereof, approved February fourth (4th) eighteen hundred and seventy (1870),*" which act was approved March 2nd, 1881. (*S. L., Minn., 1881, Ch. 113.*)

This act contained three distinct grants of power:

(1) The then existing Minneapolis & St. Louis Railway Company was authorized to make or acquire from time to time any extension of any line of railway then owned or operated by it, or thereafter constructed and operated by it, into the states of Iowa, Missouri, Kansas, Nebraska and Wisconsin, and into the territory of Dakota, or into one or more of the same, provided that authority should first be obtained from any state or territory into which its lines should be extended, to make or acquire and maintain such extensions.

(2) Authority was also granted to acquire, from time to

time, by lease, purchase, exchange of stock or otherwise, any railroad or railroads whose lines connected with its own, as they then existed, or should connect with them as they might thereafter be extended, either directly or by means of intervening lines. It was provided that such acquisition should be made upon terms agreeed upon by a contract in writing between the respective corporations, approved by two-thirds in amount of the stockholders in each such corporation; that a copy of the contract of purchase, together with evidence of the consent of shareholders, should be filed in the office of the Secretary of State.

(3) The act also provided that it should be lawful for the Minneapolis & St. Louis Railway Company to merge and consolidate its capital stock, franchises and property with the capital stock, franchises and property of any other railroad company or companies, in the construction of whose lines the Minneapolis & St. Louis Railway Company should have aided, or whose lines of railway were or should be at the time of such consolidation held under lease by the Minneapolis & St. Louis Railway Company; provided, that the lines of railway of the company or companies so consolidating should form a continuous line of railway with each other, and that no such consolidation should be made with any company owning or controlling a parallel or competing line. It was provided that the directors of the companies proposing to consolidate should enter into a separate agreement, under the corporate seal of each company, for the consolidation of such companies and railroads, such agreement to prescribe, (1), the terms and conditions of the consolidation and the mode of carrying the same into effect; (2), the name of the "new corporation," which, it was provided, might be that of any constituent corporation, or any other name; (3), the numbers, names and places of residence of the directors and other officers of the consolidated company for the first year; (4), the amount of the capital stock of the "new company," which, however, could not exceed $20,000,000 in amount; (5), the number of shares into which such capital stock should be divided (permission was given to divide the stock into classes with such preferences as might be agreed upon); (6), the amount of par value of each share; (7), the manner of converting or exchanging the capital

stock of each of the constituent companies into that of the "new corporation," and the terms of such conversion; (8), the manner of compensating those stockholders in any of the constituent companies who should decline to convert their stock into the stock of the "new corporation"; (9), how and when the directors and officers should be chosen; (10), such other details as should be deemed necessary to perfect such "new organization" and consolidation. Such agreement of the directors, the act required to be submitted to the shareholders of each of the constituent corporations separately at a meeting to be called upon at least thirty days' notice, and to be sanctioned by the stockholders of each such company by a vote of at least two-thirds in amount of the shareholders present or represented at such meeting, before it should become operative. It was also provided that such agreement, when sanctioned in the manner provided, should be deemed the agreement of the constituent companies. It was further provided that if any holder of stock in any of the corporations existing under the laws of the State of Minnesota, and so consolidating, should be dissatisfied with such consolidation and give notice of such dissatisfaction to the president, secretary or treasurer of his company within three months after the consent of his company to the consolidation, the "consolidated company" should pay to such dissatisfied shareholder the full actual value of his stock immediately prior to such consolidation. A method was also provided for the judicial determination of the value of the stock of such dissatisfied shareholder.

The sections of the act, not summarized above, read as follows (the italics are my own):

"SEC. 11. Upon the approval of such agreement and act of consolidation, as hereinbefore provided, and upon the filing of the same, or a copy thereof, in the office of the Secretary of State, the said corporations, parties thereto, shall be deemed and taken to be one (1) corporation by the name provided in the said agreement and act, and the stock of the *new corporation* issued under the terms of such agreement and act of consolidation in exchange for the stock of the *former companies*, shall be deemed and taken as lawful stock, and subject only to such further payments, calls or assessments, if any, as may be mentioned in the said consolidation agreement; and such *new corporation* shall possess all the powers, rights and franchises *conferred upon* each of its constituent corporations, *and shall*

be subject to all the restrictions and duties imposed by the laws of this State.

"SEC. 12. Upon the consummation of said act of consolidation as aforesaid, all and singular the rights, privileges, exemptions and franchises of each of said corporations, parties to the same, and all the property, real, personal and mixed, and all debts due on whatever account to either of said corporations, as well as all stock subscriptions and other things in action belonging to either of said corporations, shall be taken and deemed to be *transferred to* and vested in *such new corporation*, without further act or deed; and all claims, demands, property, rights of way, and every other interest shall be as effectually the property of the *new corporation* as they were of the *former corporations*, parties to said agreement and act; and the title to all real estate taken, by deed or otherwise, under the laws of this State, vested in either of said corporations, parties to said agreement and act, shall not be deemed to revert or be in any way impaired by reason of this act, or anything done by virtue thereof; but shall be vested in *the new corporation* by virtue of such act of consolidation.

"SEC. 13. The rights of all creditors of and all the holders of liens upon the property of either of said corporations, parties to said agreement and act, shall remain and be preserved, unimpaired, and *shall be assumed* and borne by the *new corporation*, and *the respective corporations shall be deemed to continue in existence so far as necessary to preserve the same*, and all debts and liabilities incurred by either of said corporations shall thenceforth attach to such *new corporation* and be enforced against it and its property to the same extent *as if said debts or liabilities had been originally incurred or contracted by it.* No suit or action or other proceeding now pending before any Court or tribunal, in which either of said railroad companies is a party, shall be deemed to have abated or been discontinued by the agreement and act of consolidation as aforesaid, but the same may be conducted in the name of the existing corporation to final judgment, or *such new corporation may be*, by order of the Court, on motion, *substituted as a party.* Suits may be brought and maintained against such *new corporation* for all causes of action in the same manner as against other railroad corporations in this State.

"SEC. 14. *All the provisions of the general laws of this state in regard to railroad corporations shall be applicable to any new corporation formed by consolidation under the provisions of this act*, except so far as the same shall not be applicable thereto by reason of the situation of portions of its line without this state; provided, that nevertheless the privileges, franchises, exemptions and immunities hitherto *granted*

to the Minneapolis and St. Louis Railway Company shall continue to and be vested in such *new corporation*, with the same effect as if originally granted thereto ; and that such *new corporation* may at any time hereafter be consolidated with any other railroad company or companies in the same manner and with the same effect as is by this act provided " (*See copy of Act at end of Brief of Plaintiffs in Error on Motion to Dismiss or Affirm*).

Immediately subsequently to the passage of this act, the Minneapolis & St. Louis Railway Company, the Minneapolis & Duluth Railroad Company, the Minnesota & Iowa Southern Railroad Company, and the Fort Dodge & Fort Ridgely Railroad Company (the first two being Minnesota corporations, and the last two Iowa corporations), consolidated under and in accordance with the provisions of the act last mentioned, as, and under the name of "The Minneapolis & St. Louis Railway Company" (*Record, fols. 157 & 158*).

This name differed from that of the constituent company first named (the original Minnesota Western Railroad Company) only in that the article "The" was incorporated in the name of the new company and was not contained in the name of the constituent company. *

The Consolidated Company, by the agreement of consolidation, acquired all the property, rights and franchises of its constituent companies, and became subject to all the obligations and liabilities of those companies. The stock of the consolidating companies was taken up by the Consolidated Company, and its stock issued in exchange therefor (*Record, fols. 57 to 60*). From 1881 to 1888 this Consolidated Company, which is the corporation plaintiff in error, carried on and extended the business theretofore conducted by its constituent companies (*Record, fols. 158 & 160*).

On the 28th day of June, 1888, Henry Seibert, trustee under the Consolidated Company's Improvement and Equipment Mortgage (a lien upon very much the largest part of the company's road) began foreclosure proceedings. A receiver in aid

* Throughout this argument, in order to prevent the confusion that might otherwise arise on account of the resemblance in name between the constituent company and the consolidated company, I shall speak of the corporation that was originally known as the Minnesota Western Railroad Company and after 1870 as Minneapolis & St. Louis Railway Company, and was one of the companies that consolidated under the act of 1881, as the "Minnesota Western Railroad Company ;" and shall speak of the new corporation formed under the last mentioned act as the "Consolidated Company."

of foreclosure was appointed and forthwith entered into possession of the whole road and all the property and interests of the company (*Record, fols. 163 & 164*). The company's property remained *in custodia legis* until November 2d, 1894, when everything upon which the mortgage foreclosed had been a lien, including everything upon which a levy could be made, having been sold for just enough to discharge the Improvement and Equipment Mortgage, accrued interest and costs, the whole road and all the property in the receiver's hands were transferred to the Minneapolis and St. Louis Railroad Company, the assignee of the purchaser (*Record, fols. 164 to 166*). The Consolidated Company is, and ever since November 2d, 1894, has been, admittedly, wholly insolvent (*Record, fol. 169*).

The defendant in error in this case is a judgment creditor of the Consolidated Company. The individual plaintiffs in error are shareholders in that company, who owned their stock at the time the judgment of defendant in error was obtained (December, 1887), or thereafter and prior to the institution of this suit (*Record, fols. 167 to 169, 170 and 171*). Each of them acquired all of his stock between November, 1884, and the date of the commencement of this suit. None of them was a shareholder in any of the companies that united to form the Consolidated Company (*Record, fols. 170 and 171*).

This is an action brought by defendant in error against the Consolidated Company and its shareholders, to enforce the so-called "double liability" imposed by the Minnesota constitution upon shareholders in corporations of the class to which the corporation plaintiff in error belongs. The defendant in error in his pleadings contended that the Consolidated Company is a corporation brought into existence and organized under and by virtue of the Act of 1881 above mentioned (*Record, fols. 24 and 100*), and that its stockholders are therefore subject to the liability imposed by the constitution which was then and still is in force, and that, if this contention is erroneous and the corporation should be held to have been created by the Act of 1853, the shareholders are nevertheless liable under the constitution for debts created after its adoption, among which is the claim of the defendant in error. The plaintiffs in error by their pleadings contended that the railroad company was created by the Act of 1853; that the Act of 1881 did not authorize a new cor-

poration, but merely amended the constitution of a corporation already existing; and that inasmuch as the corporation was created by the Act of 1853 which was passed and, as they claim, accepted prior to the adoption of the State Constitution, that instrument could not operate to alter the rights of the shareholders of the corporation as established by the charter act and general rules of law in force at the time of its passage, one of which, they insist, was immunity from all personal liability upon the stock of the company (*Record, fols. 83 and 84*). The case was tried upon an agreed statement of facts before the District Court of Hennepin County, Minnesota (*Record, fols. 102 to 124*). That court directed judgment, in accordance with a stipulation of submission (*Record, fols. 154 and 155*) in favor of defendant in error for the full amount of his claim (*Record, fols. 172 and 173*). A motion for a new trial was made and argument heard thereon by three of the judges of the same court, who denied the motion (*Record, fols. 174 and 175*). Thereafter, judgment was entered in accordance with the directions contained in the findings of the trial court, and an appeal was taken from that judgment by the plaintiffs in error to the Supreme Court of Minnesota (*Record, fols. 175 to 177*). By that court, the judgment entered below was affirmed (*Record, fols. 188 and 190*). That tribunal based its decision upon the following propositions: (1) the Act of 1881 authorized the creation of a new corporation; (2) the Consolidated Company was, as a matter of fact brought into existence, in pursuance of the authority conferred by this Act of 1881, by the voluntary action of its constituent companies and of its shareholders; (3) the stock of any railroad corporation brought into existence at that time, and therefore of this company, is subject to the liability imposed by the state constitution, the provisions of which entered into and qualified the act authorizing the creation of the corporation (*Record, fols. 178 to 188*).

The court expressly declined to pass upon any other constitutional question presented by the record (*Record, fol. 188*). The judgment entered by the Minnesota Supreme Court was merely one of affirmance and for costs (*Record, fol. 190*). It is to bring this judgment to the Supreme Court of the United States for review that this writ of error has been granted.

A motion to dismiss the writ or to affirm the judgment be-

low was made by defendant in error at the October, 1898, Term. After the submission of briefs thereon, an order was entered postponing further consideration thereof to the hearing on the merits.

General Propositions.

Defendant in error now contends:

(1.) That this court possesses no jurisdiction to review the judgment in this action rendered by the Supreme Court of Minnesota;

(2.) That the Consolidated Company is a corporation brought into existence under authority of the Act of 1881, and its shareholders are, therefore, subject to the liability imposed by Section 3, Article X, of the Constitution of Minnesota;

(3.) That even if the Consolidated Company should be held to be identical with the Minnesota Western Railway Company and to have been created by the Act of 1853, its shareholders are nevertheless liable under the State Constitution for debts contracted subsequently to the adoption of that instrument.

Argument.

THIS COURT DOES NOT POSSESS JURISDICTION TO REVIEW THE JUDGMENT OF THE SUPREME COURT OF MINNESOTA.

I.

At the outset we may eliminate from the subjects for discussion the various claims that jurisdiction in this Court to review the decision of the Minnesota Supreme Court has arisen by reason of the action of the latter in construing the Act of 1881. This claim is presented in different forms in the SECOND,

THIRD and FOURTH ASSIGNMENTS OF ERRORS filed in this Court by plaintiffs in error (*Record, fol. 16*).

In their SECOND ASSIGNMENT, plaintiffs in error assert that the State of Minnesota, by means of the provisions of Section 3, Article X, of its Constitution, has attempted, in violation of the Fourteenth Amendment of the Federal Constitution, to deprive plaintiffs in error of rights vested in them by the Act of 1881.

I cannot discover that counsel for plaintiffs in error in his brief filed on the motion to dismiss or affirm has anywhere attempted an explanation of the claim contained in this assignment.

It cannot be, however, that the assignment is intended to set forth a claim that the provision of the Minnesota Constitution which became operative in 1858, of itself, destroys rights vested in plaintiffs in error by the Act of 1881, or in other words impairs the obligation of a contract contained in that act, for it has been decided too frequently to admit of such a contention, that only an act adopted subsequently to the making of the contract or the vesting of the rights asserted can furnish ground for such a claim.

> *Lehigh Water Co.* vs. *Easton, 121 U. S. 388 ;*
> *New Orleans Water Works Co.* vs. *La. Sugar Refining Co., 125 U. S., 18 ;*
> *Central Land Co.* vs. *Laidley, 159 U. S., 103, p. 109 ;*
> *Bacon* vs. *Texas, 163 U. S., 207, p. 216.*

It is not suggested that, since the passage of the Act of 1881, anything has been done by the State, through the agency of its legislative or its executive department, or of any ministerial officer or of any individual or corporation acting under its authority, that constitutes a taking of, or in any way affects, the right which is alleged to have been vested in plaintiffs in error by that act.

It is evident that the assignment is an attempt to characterize *the action of the State Courts in enforcing the constitutional provision in question*, as against the shareholders in the Consolidated Company, as a taking of the property of the plaintiffs in error without due process of law.

It is the action of the State Courts of which complaint is

made and the gravamen of the complaint must be that those Courts have erred in so construing the Act of 1881 that the provision of the State Constitution declaring an individual liability of shareholders is applicable to the shareholders in the corporation organized under the authority of that act.

In their THIRD ASSIGNMENT, plaintiffs in error assert, *expressly*, that *the enforcement* of Section 3, Article X, of the Minnesota Constitution is in violation of the Federal Constitution in that it impairs the obligation of a contract contained in the Act of 1881.

In this instance we are furnished an explanation of their claim which must apply as well to the same claim as stated in the SECOND ASSIGNMENT. Counsels for plaintiffs in error advance and reiterate the following propositions:

Whether the Act of 1881 merely authorized an amalgamation of the Minnesota Western Railroad Company and other companies, and continued in the amalgamated companies, under a different form of organization, the rights and immunities of the Minnesota Western Railroad Company (as is contended by plaintiffs in error), or authorized the creation, by agreement, of a *new* corporate entity and the transfer to it of rights and immunities theretofore possessed by the Minnesota Western Railroad Company (as is contended by defendant in error), the intention of the legislature, as it appears expressed in the Act, was that the new organization should have vested in it, whether by confirmation or by transfer, *all* of the immunities of the Minnesota Western Railroad Company, of which immunity of shareholders from individual liability was one (*Brief of Plaintiffs in Error on Motion to Dismiss or Affirm, pp. 13, 15 to 22 and 24*). The shareholders, plaintiffs in error, by acting upon the Act of 1881, crystalized it into a contract (*Brief of Plaintiffs in Error on Motion to Dismiss or Affirm, p. 22*). *By the enforcement* of the individual liability claimed to exist under its constitution, the State has impaired the obligation of this contract between the State and plaintiffs in error contained in the Act of 1881 (*Brief of Plaintiffs in Error on Motion to Dismiss or Affirm, pp. 8, 24 and 25*). This result, it is true, has occurred through the agency of the judiciary and by reason of an erroneous construction by the State Courts of the Act of 1881 (*Brief of Plaintiffs in*

Error on Motion to Dismiss or Affirm, p. 25). But the fact that it has occurred in this manner is immaterial. The jurisdiction of this Court to review the decision is as complete under these conditions as it could be under any (*Brief of Plaintiffs in Error on Motion to Dismiss or Affirm, p. 25*).

In their FOURTH ASSIGNMENT, plaintiffs in error assert simply that the State Court erred in holding that the consolidation agreement entered into under authority of the Act of 1881 created a new corporation.

Here the claim which is made by indirection in each of the other two assignments is set forth in all its baldness. It requires no explanation.

For two conclusive reasons, no claim of jurisdiction in this Court can be successfully founded upon the assertions contained in any one of these assignments.

1. It is not alleged by plaintiffs in error that the State through the agency of its legislative or its executive department or of any ministerial officer, or of any individual or corporation acting under its authority, has deprived plaintiffs in error of rights secured by the Act of 1881, or that by means of any law passed subsequently to the passage of that act the State has impaired the obligation of the contract contained in that act; but, in each case, the action complained of as a taking of property or as an impairment of contract obligation is the action of the State Courts in misconstruing (so they assert) the act alleged to confer the rights or constitute the contract claimed.

That such judicial action cannot constitute a ground of jurisdiction in this Court is too well settled to require argument or quotation from authorities.

See

Railway Company vs. Todd County, 142 U. S., 282;
Bank vs. Buckingham's Ex'rs., 5 How., 317, pp. 342 and 343;
Railroad Company vs. Rock, 4 Wall., 181;
Railroad Company vs. McClure, 10 Wall., 511;
Knox vs. Bank, 12 Wall., 379;
Turner vs. Wilkes Co. Comrs., 173 U. S., 461.

Nor can jurisdiction be founded upon the claim that the

Minnesota Supreme Court, in construing the Act of 1881, overruled or ignored prior decisions of its own to a contrary effect. The argument upon that point made by counsel for plaintiffs in error is substantially:

That the Minnesota Supreme Court held previously to 1881 (*First Division, &c., R. R. Co.*, vs. *Parcher, 14 Minn., 297, Gil. 224*) that neither (1) the transfer by legislative act of forfeited franchises theretofore possessed by one set of persons, and afterward acquired and held by the State without merger, to another set of persons who, under authority of the act providing for the transfer organized as a corporation, nor (2) the division of the franchises of an existing corporation between two sets of its shareholders, under authority contained in the original charter of the Company which antedated the State Constitution, with the result that two separate organizations existed where but one had existed theretofore (which transaction was subsequently ratified by legislative act), was violative of the prohibition of incorporations by special act contained in the State Constitution; that the effect of this was to hold that the organization of a new corporate entity and the transfer to it of the franchises of an existing company does not amount to the creation of a new corporation; that this holding had in 1881 become a rule of property; that the organization of the Consolidated Company was perfected in reliance upon this rule; that by its decision in this case the State Supreme Court holds that a transaction such as that described does operate to create a new corporation (but in this counsel ignores the fact that the Consolidated Company was granted many franchises not possessed by the Minnesota Western Company as well as the very plain expression of the legislative intention); that, therefore, the construction given to the Act of 1881, by the State Court, taken in connection with its holding that plaintiffs in error are estopped to deny the constitutionality of that Act, constitutes a fraud upon the plaintiffs in error, an impairment of the obligation of their contract, and a taking of their vested rights. (*Brief of Plaintiffs in Error on Motion to Dismiss or Affirm, pp. 33 to 38*).

Even if the conclusion, thus arrived at, followed from the premises stated (and it does not), the action complained of was

merely an erroneous construction of a contract by the State Court, and cannot operate to confer jurisdiction here.

Mitchell vs. *Lenox, 14 Pet., 49.*

And see, as directly in point,

Land Company vs. *Laidley, 159 U. S., 103, pp. 109 to 112;*
Bacon vs. *Texas, 163 U. S., 207, pp. 220 to 224.*

2. But *no* claim that plaintiffs in error have been deprived of rights vested in them by the Act of 1881, or that the obligation of a contract between them and the State contained in that Act has been impaired can avail to confer jurisdiction of this cause upon this Court.

Plaintiffs in error cannot raise in this Court any Federal question that was not raised, as appears upon the face of the record, prior to judgment in the Supreme Court of Minnesota.

See *R. R. & Banking Company* vs. *Marshall, 12 How. 165;*
Mich. Cen. Railroad Company vs. *Mich. So. Railroad Company, 19. How., 378;*
Texas & Pacific Railroad Company vs. *Southern Pacific Company, 137 U. S., p. 48, and cases cited;*
California Powder Works vs. *Davis, 151 U. S., p. 393;*
Zadig vs. *Baldwin, 166 U. S., 485, p. 488;*
Railroad Company vs. *Louisville, 166 U. S., 709;*
Miller vs. *Cornwall Railroad Company, 168 U. S., 131, pp. 133 and 134;*
Kipley vs. *Illinois, 170 U. S., 182, pp. 187 and 188;*
Water Power Company vs. *Street Railway Company, 172 U. S., 475, pp. 487 and 488;*
Bank vs. *Owensboro, 173 U. S., 636.*

An examination of the pleadings in this case and of the assignment of errors upon appeal to the Minnesota Supreme Court (*Record, fols. 12 to 14*) will readily discover the only Federal question raised by plaintiffs in error in either the Dis-

trict Court or the Supreme Court of Minnesota and the manner in which that question was raised.

The defendant in error was asserting against the individual plaintiffs in error the right to recover from them certain amounts of money which he alleged they, as shareholders in the Consolidated Corporation, had become liable to pay under and in accordance with the provisions of Section 3, Article X, of the Minnesota Constitution.

The plaintiffs in error, in opposition set up:

(1) That by a contract between the State of Minnesota and the Minnesota Western Railroad Company, *contained in the Act of 1853*, the shareholders of that company were granted perpetual immunity from all such liability, and that the provision of the Minnesota Constitution above mentioned, if by its terms applicable to the Minnesota Western Railroad Company, is void in so far as it purports to affect shareholders of the Minnesota Western Railroad Company, being a law of a State impairing the obligation of this contract;

(2) That the Consolidated Corporation, in which the plaintiffs in error are admittedly shareholders, is the Minnesota Western Railroad Company, simply reorganized under another name;

(3) Therefore, that the individual plaintiffs in error, being shareholders in the Minnesota Western Railroad Company, are exempt from all individual liability for the claim asserted by defendant in error.

The truth of each premise of the foregoing syllogism was denied by defendant in error.

By his denial of the major premise, two questions were raised *which, however, could become material only in case the Consolidated Company and the Minnesota Western Railroad Company were held to be identical*, (1) whether *the Act of 1853* did confer such perpetual, or any, immunity upon the shareholders in the Minnesota Western Railroad Company, and (2) whether Section 3, Article X, of the Minnesota Constitution, if applied to the shareholders of the Minnesota Western Railroad Company, did, in view of all the facts, impair the obligation of the *contract contained in the Act of 1853*. These two questions, together, constituted a "Federal question."

That this was the Federal question, and the only one, raised below is plain upon the face of the record. The ANSWER of the individual defendants (plaintiffs in error) filed in the District Court, contains the following allegations: "That the said Minneapolis and St. Louis Railway Company was incorporated *prior* to the adoption or enactment of the constitutional provisions and statutes referred to. That said Minneapolis and St. Louis Railway was incorporated IN THE YEAR 1853, UNDER AND PURSUANT TO THE PROVISIONS OF CHAPTER 66 OF THE SPECIAL LAWS ENACTED BY THE LEGISLATURE OF THE TERRITORY OF MINNESOTA IN THE YEAR 1853, under and by the name of the Minnesota Western Railroad Company, and which name was subsequently changed to the Minneapolis and St. Louis Railway Company, substantially as set forth in the first division of said complaint. *That the liability of the stockholders of said Minneapolis and St. Louis Railway Company was fixed by said act of incorporation*, AND NOT OTHERWISE; and that the constitutional provision and laws referred to in the complaint are not applicable to or binding upon these defendants in that behalf." (*Record, fols. 83 and 84.*)

It will be noticed (1) that the only reference made to any contract or alleged contract is to the Act of 1853, (2) that this act is designated as Chapter 66 of the Territorial Laws of 1853, thus excluding the idea that reference to any amendatory act was intended, and (3) that it is expressly asserted that this act is the only one affecting the rights of the parties.

There is no other allegation in the pleadings of the plaintiffs in error which, even by implication, claims the benefit of any contract or of any provision of the Constitution of the United States.

The REPLY of the defendant in error contained the following, directed to allegations of the answer of plaintiffs in error, last quoted:

"Plaintiff denies that said Minneapolis and St. Louis Railway Company was incorporated prior to the adoption or enactment of the constitutional provisions and the statutes referred to in the plaintiff's amended complaint herein and alleges that said defendant, The Minneapolis and St. Louis Railway Company, was incorporated and exists under and by virtue of the act of the legislature of Minnesota, approved March 2, 1881 * * * and of the consolidation agreement entered into * * * as alleged in plaintiff's amended complaint herein,

and not otherwise; and that said incorporation occurred and said defendant, The Minneapolis and St. Louis Railway Company, began to exist as a corporation June 1, 1881, and not previously" (*Record, fol. 100*).

Thus, a distinct issue was raised as to whether the rights and liabilities of the plaintiffs in error as shareholders had been established by the Act of 1853 or by the Act of 1881; the plaintiffs in error asserting that they had been established by the former act, and by that act only.

In the ASSIGNMENT OF ERRORS, filed in the Minnesota Supreme Court, there are but three assignments by means of which any attempt is made to claim the protection of the Federal Constitution. They are as follows:

(1.) "The court erred in holding that Section 3, Article X, of the State Constitution if applied to the defendant railway company did not violate Section 10, Article 1, of the Constitution of the United States, in that the provisions of said Section 3, Article X, impaired the obligation of the charter contract *contained in said Chapter 66, laws of 1853, Territory of Minnesota*" (*Assignment VII; Record, fol. 12.*)

(2.) "The Court erred in holding that Section 3, Article X, of the State Constitution if applied to the defendant railway company is not in violation of the Fourteenth Amendment of the Constitution of the United States, in that the State of Minnesota, by and through the provisions of said Section 3, Article X, assumed to impair and destroy rights *theretofore* vested in said defendants" (*Assignment VIII; Record, fol. 13*).

(3.) "The Court erred in holding that Section 3, Article X, of the State Constitution, if applied to the defendant railway company, is not in violation of the Fourteenth Amendment to the Constitution of the United States in that the State of Minnesota, by and through the provision of said Section 3, Article X, assumes to abridge the privileges and immunities of the defendants as citizens and to deny to defendants the equal protection of the laws, and to deprive them of their property without due compensation or due process of law." (*Assignment IX; Record, fol. 13*).

Now, it will be noted that Assignment VII expressly refers to the contract contained in the Act of 1853 and to no other contract. It is evident that Assignment VIII and Assignment IX are but repetitions, in different forms, of the same claim invoking the protection of the Fourteenth Amendment of the

Federal Constitution. The rights referred to in Assignment VIII are the rights "theretofore vested in said defendants," that is to say, prior to the adoption of the State Constitution; and it is evident that the privileges and immunities referred to in Assignment IX, and the property referred to in the same assignment, are the privileges, immunities and property rights claimed by the defendant under the Act of 1853, and no other.

It must now be plain that the only contract relied upon in the courts below by plaintiffs in error—the only contract the obligation of which they asserted to be impaired by Section 3, Article X, of the Minnesota Constitution—was the one contained in the Act of 1853.

It will not do to say that, because the Act of 1881 was in form an amendment of the Act of 1853, plaintiffs in error, when they invoked the Federal Constitution in support of the contract contained in the Act of 1853 and asserted the impairment of the obligation that contract must also have invoked the same support for the contract now alleged to be contained in the Act of 1881. (*See Brief of Plaintiffs in Error on Motion to Dismiss or Affirm, pp. 30 to 33.*) In the courts below, at all stages of this case, the distinction, amounting even to antagonism, between the two acts was so clearly drawn as to exclude the idea that reference to or mention of one implied reference to the other. No claim that the Act of 1881 should be held to relate back, or that any contract contained in it had been impaired, was ever even suggested. The sole discussion of that act, even in the briefs or arguments ounsel, of c related to the proper construction to be placed upon it.

It follows that this claim cannot now operate to confer jurisdiction upon this court.

II.

We have left to consider the inquiry, whether the Federal question that plaintiffs in error did raise in the Supreme Court of Minnesota was decided by that Court, or was decided in such manner as to confer upon this Court jurisdiction to review its decision.

Plaintiffs in error claimed to be shareholders in the Minne-

sota Western Railroad Company; that, as such they were entitled, under contract contained in the Act of 1853, to immunity from individual liability; that Section 3, Article X., of the Minnesota Constitution (a statute of the State), when applied to them, impaired the obligation of their contract and deprived them of their property without due process of law, and, to that extent, was repugnant to the Constitution of the United States. The case, if this Court has jurisdiction of it at all, must, therefore, fall within the second of the classes of cases enumerated in Section 709 of the Revised Statutes; that is to say, if this Court has jurisdiction it must be because there has been drawn into question the validity of a statute of a State on the ground that such statute is repugnant to the Constitution of the United States, the decision whereon has been in favor of the validity thereof.

It is not sufficient for the maintenance of the jurisdiction of this Court that the validity of a law of the State has been drawn into question on the ground that the law is repugnant to the Federal Constitution. The validity of the law must have been sustained. Nor, for that matter, is it sufficient that an immunity has been claimed under the Federal Constitution. Such immunity must have been denied.

See *Israel* vs. *Arthur*, *152 U. S., p. 361.*
Also *Eustis* vs. *Bolles*, *150 U S., 361, p. 366.*
Pierce vs. *Somerset Ry.*, *171 U. S., 641.*
Capital Bank vs. *Cadiz Bank*, *172 U. S., 425.*
Allen vs. *Southern Pacific R. R. Co.*, *173 U. S., 479.*

"It is settled law that, to give this Court jurisdiction of a writ of error to a State Court, it must appear affirmatively, not only that a Federal question was presented for decision by the State Court, but that its decision was necessary to the determination of the cause, and that it was actually decided adversely to the party claiming a right under the Federal Laws or Constitution, or that the judgment as rendered could not have been given without deciding it." (*Eustis* vs. *Bolles*, *150 U. S., p. 366.*) It is apparent, therefore, that this Court cannot have jurisdiction in this case, unless the decision of the Minnesota Supreme Court sustained the validity of Section 3, Article X., of the State Constitution, *as against the objection that it operated to impair the obligation of the contract contained in the Act of 1853.*

If the Supreme Court of Minnesota had determined the Consolidated Company to be identical with the Minnesota Western Railroad Company, that is, if it had determined that the plaintiffs in error were shareholders in the last-named company, it would have been obliged to pass upon the Federal question raised by plaintiffs in error, and if in passing upon that question the Court had determined either that the Act of 1853 did not contain an exemption such as was claimed by plaintiffs in error, or if, admitting the existence of the exemption, it had held that nevertheless, they were liable for debts contracted after the adoption of the Minnesota Constitution, it is plain that the record would have disclosed a Federal question and that this Court would have possessed jurisdiction. But the Supreme Court of Minnesota did nothing, whatever, of this sort. Having determined that the Minnesota Western Railroad Company and the Consolidated Company were distinct and independent corporations, it was not called upon to construe the Act of 1853. It did not attempt to decide what rights or immunities that act secured to the Minnesota Western Railroad Company or its shareholders. It did not decide in any way, even by the remotest inference, whether by the terms of the Constitution of Minnesota, shareholders of the Minnesota Western Railroad Company were made liable personally for any of its debts. Nor did it attempt to decide whether, if Section 3, Article X, of the Minnesota Constitution by its terms applied to shareholders in the Minnesota Western Railroad Company, the provisions thereof as so applied, were or were not valid under the Federal Constitution. Upon the contrary, the Court expressly repudiated any intention to decide any of these questions. At one point in its decision, it says: "Whatever may be the liability of the several (constituent) corporations we need not inquire, because the liability here sought to be enforced is one against individuals who have been and are stockholders in the new corporation." (*Record, fols. 185 and 186.*) And again: "Other questions have been raised and discussed by the respective counsel, but a decision upon them by this Court in this action is entirely unnecessary, and we express no opinion thereon." (*Record, fol. 188.*) See also the syllabus (*Record, fol. 178*) which in Minnesota is required to be prepared by the Court itself. (*G. S. Minn., 1894, Sec. 4826.*)

In other words, the fact is that while the plaintiffs in error

have drawn in question the validity of a provision of the State Constitution upon the ground of its being repugnant to the Constitution of the United States, no decision in favor of the validity of the State Constitution has been made.

But counsel for plaintiffs in error says that, while the State Supreme Court did not expressly pass upon the Federal question raised below, *the effect* of its action was to decide that question adversely to his clients. This is not true; but if it were the fact would not avail to improve the position of the plaintiffs in error, for this tribunal has held many times that if a case involve two questions, one Federal, the other non-Federal, and both questions be decided against the plaintiff in error, if the decision of the question not Federal be sufficient to support the judgment rendered, this Court cannot entertain jurisdiction.

Klinger vs. Missouri, 13 Wall, 257 p. 263;
Johnson vs. Risk, 137 U. S., 300;
Eustis vs. Bolles, 150 U. S., 361, pp. 366 and 367;
Rutland R. R. Co. vs. Central Vermont R. R. Co., 159 U. S., 630.
Missouri Pac. Ry. Co. vs. Fitzgerald, 160 U. S., 556, p. 576;
Union National Bank vs. L. N. A. & C. Ry. Co., 163 U. S., 325;

Indeed the rule goes further, for if the judgment of a State Court may, so far as appears, have been based upon either of two grounds, one involving and the other not involving a Federal question, and if a decision based upon the latter ground only would be sufficient to support the judgment, this Court is without jurisdiction.

Michigan vs. Flint & Pere Marquette R. R. Co., 152 U. S., 363;
Dibble vs. Land Company, 163 U. S., 63;
Harrison vs. Morton, 171 U. S., 38;

But it *affirmatively* appears by the record that this case was decided *exclusively* upon a ground not involving a Federal question, and that the decision thereon is sufficient to support the judgment.

It had been been admitted that the debt owing to the defendant in error was the debt of the Consolidated Company; that the plaintiffs in error were shareholders in that Company and had been sued as such, and it was conceded that they could not claim to be shareholders in the Minnesota Western Railroad Company or entitled to the benefits conferred by its charter unless that Company and the Consolidated Company were really identical. It had also been admitted that the Consolidated Company was organized in 1881, and it was not disputed that if that Company was in fact a new corporation, distinct from the Minnesota Western Railroad Company, the provision of the Minnesota Constitution, establishing and defining the liability of shareholders, was applicable to its shareholders who, in that case, could claim no contract exempting them from individual liability.

Now, on the threshold of the case, the defendant in error, as we have seen, denied that the Consolidated Company was either identical with or a mere reorganization of the Minnesota Western Railroad Company. He asserted, on the contrary, that the two corporations were distinct and independent of each other. It will be perceived, therefore, (1) that the question whether the two companies were really identical was one that the State Court was forced to decide; (2) that this question was not Federal in its nature, and (3) that, upon the contrary, the decision of the question in the negative not only obviated the necessity of considering the nature of the contract set up by plaintiffs in error (that contained in the Act of 1853) or the question of the applicability of Section 3, Article X, of the Minnesota Constitution to shareholders in the Minnesota Western Railway Company, or the validity of that section if so applied under the Federal Constitution, but would have rendered immaterial a decision of these matters or of any of them, in case the Court had chosen to make such decision.

The brief filed by plaintiffs in error upon motion to dismiss or affirm seems, however, to proceed upon the theory that the question whether the Minnesota Western Railroad Company and the Consolidated Company were really identical was a Federal question. They assert that, inasmuch as they claimed in the State Court that the Act of 1853 granted a certain immunity to their corporation, and therefore to them, and the Court decided that the immunity claimed, if granted at all,

was granted, not to their corporation, but to another and had never been acquired by their corporation, and arrived at this decision through a construction of the Act of 1881, this Court must possess jurisdiction to construe that act in order to determine for itself whether their corporation was not, in fact, the grantee of the immunity set up.

It cannot be claimed that such jurisdiction arises by reason of the circumstance that the State Court in arriving at its decision, was obliged to construe the Act of 1881, for it has on numberless occasions been said in the decisions of this tribunal: "The construction given by the Courts of the State to State legislation and to State constitutions are conclusive upon this Court with a single exception, and that is when it is called upon to interpret the contracts of States, although they have been made in the forms of law."

Jeff. Branch Bank vs. *Skelly*, *1 Black*, *436*, *p. 443.*

See also

New Orleans Water Works vs. *La. Sugar Co.*, *125 U. S.*, *18*, *p. 30;*

St. P. M. & M. Ry. Co., vs. *Todd County*, *142 U. S.*, *282;*

New Orleans vs. *New Orleans Water Works*, *142 U. S.*, *79;*

Miller's Executors vs. *Swann*, *150 U. S.*, *132;*

Eustis vs. *Bolles*, *150 U. S.*, *361*, *and cases cited.*

Nor can jurisdiction be claimed upon the ground that the State Court held (as it did hold) that the Legislature could not constitutionally authorize the old company to transfer or the new company to take the right of immunity in question.

Sherman vs. *Smith*, *1 Black*, *587*, *p. 594;*

Snell vs. *Chicago*, *152 U. S.*, *191;*

The theory of plaintiffs in error, therefore, must be founded upon the assumption that this Court has jurisdiction, upon writ of error to a State Court, to determine for itself the identity or non-identity of the party claiming the right involved with the person to whom it is granted.

This case is in the respect under discussion analogous to one in which A claims to be the person to whom a right has been granted under the name of B, the other party to the controversy contending that A. is not B. Would it be contended in

such a case, that this Court possessed jurisdiction to review a decision that A. and B. were different persons? Certainly not. It is true that, in the case suggested, the question whether A. and B. are identical is purely a question of fact. But if this Court has jurisdiction to determine this question of identity and therefore to construe a statute of a State which otherwise it would have no authority to construe, certainly the same paramount right and necessity to determine the question for itself would exist even if the question were one of pure fact. Moreover, the truth is that the identity or non-identity of the party claiming a contract right with the person with whom the contract had been made is, in the ultimate, always a fact, whether that fact be ascertained by the examination of evidence or the construction of a statute or a document.

It is evident that the theory of plaintiffs in error proves too much.

So much of the principal question considered and decided by the State Court.

It will hardly be contended that a Federal question was involved in any other of the matters treated in the decision of that Court.

After deciding that the Consolidated Company was a corporation distinct from and independent of the Minnesota Western Railroad Company, it went on to determine the scope of Section 3, Article X., of the State Constitution, holding that provision applicable to all shareholders in every corporation (with certain immaterial exceptions) organized after the adoption of the State Constitution, and particularly, that railroad companies did not fall within either of the classes excepted by the terms of the section. It, therefore, held that the constitutional provision in question applied to the shareholders in the Consolidated Company.

As it is not even now claimed that this provision of the State Constitution entered into the contract set up by plaintiffs in error, but is claimed, on the contrary, that it operates to impair that contract, it must be and, I think, is conceded that this Court has no jurisdiction to review this action of the State Supreme Court.

See *C. M. & St. P. Ry, Co.* vs. *Minnesota, 134 U. S., 418, p. 456;*
and, also, *Sherman* vs. *Smith, 1 Black, 587, p. 594.*

The State Court further held, at least by necessary implication, that the individual plaintiffs in error had, by taking their stock in and accepting the benefits of the Consolidated Company, voluntarily assumed the obligations attached thereto under the Minnesota laws. (*Record, fols. 178, 185 and 186.*) This was simply the statement of a self-evident implication of general law.

In conclusion, the State Court held that even if the Act of 1881, in view of the construction given to it by that Court, ought to be held unconstitutional as a special act of incorporation, and, therefore, within the prohibition of such acts contained in the State Constitution, the plaintiffs in error were estopped, by reason of their participation in the benefits of the act and their conduct in holding the Consolidated Company out to the world as a corporation, to assert the unconstitutionality of the act. This again was a decision upon a question of purely local law.

See *Eustis* vs. *Bolles, 150 U. S., 361;*
Pierce vs. *Somerset, 171 U. S., 641.*

These holdings together constituted the whole decision of the Minnesota Supreme Court. Each of them is a determination of a matter of fact or of local law, and in no way involves or implies a decision upon the Federal question raised in the Court below. That the decision is sufficient to sustain the judgment rendered is evident from this, that if in addition to the decision actually made each of the propositions involved in the Federal question presented had been decided in favor of the plaintiffs in error, the whole decision would have been perfectly consistent and the judgment must have been the same.

I submit that this case ought to be controlled by the decision of this Court in *Eustis* vs. *Bolles, 150 U. S., 361, pp. 366 and 367.*

Cf. Eustis vs. *Bolles, 146 Mass., pp. 414 to 417.*

See, also,

Beaupre vs. *Noyes, 138 U. S., 397.*

I have demonstrated, I believe, both that no Federal question was decided by the State Court, and that if the Federal question raised had been decided, no jurisdiction in this Court would have existed for the reason that the judgment rendered

is founded upon the decision of a question not Federal in its character, which decision is alone sufficient to support the judgment. It follows that this Court has not jurisdiction of the case, and that the writ of error should be dismissed.

THE CONSOLIDATED COMPANY WAS BROUGHT INTO EXISTENCE UNDER THE AUTHORITY OF THE ACT OF 1881. ITS SHAREHOLDERS ARE, THEREFORE, SUBJECT TO THE LIABILITY IMPOSED BY SECTION 3, ARTICLE X, OF THE MINNESOTA CONSTITUTION.

I.

The Supreme Court of Minnesota has decided that the personal liability imposed upon shareholders by the State Constitution attaches to the shareholders in every railroad corporation brought into existence subsequently to the adoption of the constitution, and specifically that it attaches to the shareholders in any new corporation formed under the authority of Act of 1881; and, whatever else it may do, this Court certainly will not give to the Minnesota Constitution, the law that plaintiffs in error claim impairs the obligation of their contract, a construction different from that adopted by the Supreme Court of the State in this case.

If, then, the Consolidated Company *is* a new corporation brought into existence under authority of the Act of 1881, plaintiffs in error, who are admittedly shareholders in that company, cannot seriously claim any contract exempting them from personal liability for corporate debts. Upon the contrary it must be admitted, in that case, that in their very contract they have assumed the personal liability imposed by the Constitution, which was then in full force. Any one taking advantage of the Act of 1881, to organize a new corporation must have done so (whatever the terms of the act itself) in contemplation of the fact that the authority granted to and exercised by him was coupled by the supreme legislative will with the burden of personal liability for corporate debts, and that the assumption of this liability, established as it had been as a condition not only of his exercise of the authority and enjoy-

ment of the rights granted but of the legislature's power to grant any authority or right, was implied in his act. Any one thereafter acquiring stock in a company so organized, as did the individual plaintiffs in error, must have done so in contemplation of the same facts and must be considered voluntarily to have assumed and contracted for the liability imposed by the Constitution upon all shareholders in every such company.

For closely analogous cases see

Shields vs. *Ohio*, *95 U. S.*, *319*, affirming *26*, *Ohio St.*, *86*. Ashley vs. Ryan, 153 U. S., 436;
State vs. Northern Central Ry. Co., *44 Md.*, *131*;
Charlotte C. & A. R. R. Co. vs. Gibbes, *27 S. C.*, *385*;
Frazer vs. Railway Co., *88 Tenn.*, *138*;
Morawetz on Corporations, *Secs. 944-47*;
Thompson on Corporations, *Sec. 5424*.

Was, then, the Consolidated Company brought into existence under authority of the Act of 1881? And, if so, was it when so brought into existence a substantially new corporation?

It is admitted that *this particular organization*, whatever its character may be, was brought into existence under authority of the Act of 1881, and of that act only, on the first day of June of that year. It was constituted strictly in accordance with the provisions of subsections 10 to 14 of that act, and with the manifest and undeniable intention that it should be the organization therein contemplated. It must necessarily therefore be whatever sort of organization was authorized by those provisions, and we must determine the nature and status of the company by ascertaining whether the authority contained in the sub-sections 10 to 14 of the Act of 1881 was for the organization of a new corporation or merely for a reorganization of the Minnesota Western Railroad Company. If the authority conferred was for the organization of a new company, the plaintiffs in error, when they acquired their stock in it, assumed and agreed to a personal liability for the debts of the Consolidated Company to an amount equal to the par value of the stock held or owned by them.

We are brought, then, to the question: What was the authority conferred by the Act of 1881?

The intent of the act that the Consolidated Company, if one should come into existence, should be regarded as a new and independent corporation, is plain upon the face of the act. The Consolidated Company authorized is repeatedly spoken of as a "new corporation." (In Sec. 1, Sub-Sec. 10, Sub-Div, First, and in Sub-Secs. 11, 12, 13 and 14 it is so spoken of at least sixteen times.). The constituent companies are constantly spoken of as the "old corporations," and the "former corporations," and a manifest intention that they should be regarded as distinct from the Consolidated Company is shown by the provision that they "shall be deemed to continue in existence so far as necessary" to preserve the rights of creditors. The distinct and independent character of the Consolidated Company is made especially apparent in the provision authorizing the substitution of the new company in suits then pending against any of its constituent companies. (*Sub-Sec. 13.*)

The act of consolidation requires entirely new articles of incorporation to be adopted and filed. It permits the capital stock, and the par value of the shares of stock, in the Consolidated Company, and the classification of its stock, to be determined in these new articles, without reference to the conditions existing in the constituent companies, or any of them. It provides for the issuance of its own new stock by the Consolidated Company. It requires the consent to the consolidation of two-thirds in amount of the shareholders representing each constituent company. It provides a method by which shareholders in the constituent companies may be forced to assent to the arrangement or to withdraw, and a remedy by means of which they may obtain compensation. Ownership of stock in any of the constituent companies does not entitle any one to any voice in the management or interest in the assets of the new company, merely to the right to exchange his stock for that of the new company or to money compensation for his loss of property interest, in case he refuses to exchange. These provisions are absolutely incompatible with any idea that the Consolidated Company was intended to be a mere reformation of the old companies or of any one of them.

The existence of a distinct provision of the same act by

which the old Minneapolis & St. Louis Railway (Minnesota Western) Company was expressly permitted to acquire the lines of other companies while retaining its original charter intact, makes it plain that the Legislature intended that in case of consolidation a new corporation should come into existence.

That the distinction intended between the Consolidated Company to be organized and the Minnesota Western Railroad Company was not to be one of mere form, but was a real and substantial distinction is also evident, for the new company was to have not only the new powers that I have already enumerated but was to acquire (so far at least as such course should be compatible with the general laws of the State) all the franchises of any and all other companies of certain classes designated in the act with which the Minnesota Western Railroad Company might unite to form a new company. *The possession of these new franchises distinguished the new company from the Minnesota Western Railroad Company as broadly and substantially as any one of the other constituent companies joining in the consolidation had been distinguished from the Minnesota Western Railroad Company.*

The intent of the constituent companies, themselves, to organize a new corporation, distinct from and independent of the Minnesota Western Railroad Company, is evident from their action in taking advantage of all the powers conferred upon a Consolidated Company that had not been possessed by the Minnesota Western Railroad Company and was emphasized by the adoption of a distinct name.

And my conclusion is confirmed when we remember that this Act of 1881 was formulated and adopted in view of the decision of the Minnesota Supreme Court in *Fitz.* vs. *Minnesota Central Railroad Company, 11 Minn., 414 (Gil. 304).*

The differences that distinguish the present (consolidated) The Minneapolis & S. Louis Railway Company from the old Minneapolis & St. Louis Railway Company (Minnesota Western Railroad Company) are much more numerous and important than were the differences that distinguished the Minnesota Central Railway Company from the Minneapolis & Cedar Valley Railroad Company, discussed in the Fitz. case. In that case it was determined that the two corporations there considered were plainly distinct.

See also

Huff vs. *Railroad Company, 11 Minn. 180 (Gilfillan 114);*
Shields vs. Ohio, 95 U. S., 319;
State vs. No. Cen. Ry. Co., 44 Md., 131;
R. R. Co. vs. Gibbes, 27 S. C., 385;
Frazer vs. Ry. Co., 88 Tenn., 138;

Cf. *Ames* vs. *L. S. & M. Railroad Company, 21 Minn. 241.*

The fact that the Act of 1881 was cast in the form of an act amendatory of the act incorporating the Minnesota Western Railroad Company is only one item of evidence (and in this instance an extremely unimportant item) as to the intention of the Legislature, and can have little weight in view of the plain and unambiguous lauguage of the act itself.

See *Ames* vs. *L. S. & M. R. R. Co., 21 Minn. 241.*

It does not seem to admit of doubt that the Consolidated Company was a new corporation, independent of the Minnesota Western Railroad Company and distinct from it in substantial respects. It follows that the individual plaintiffs in error, by becoming shareholders in it, assumed the liability imposed by the State Constitution upon shareholders generally, *whatever the provisions of the Act of 1881 upon that subject may have been.*

II.

But I believe a careful perusal of that act will convince the court that it was no part of the purpose of the act to transfer to the shareholders of any consolidated company organized by its authority the exemption from individual liability for corporate debts, if any, possessed by the shareholders in the Minnesota Western Railroad Company.

(Plaintiffs in error do not claim that the Legislature had capacity in 1881, to authorize the transfer to the shareholders in the Consolidated Company of the exemption from personal liability possessed by the shareholders in either of the Iowa corporations that joined in the consolidation.)

The contrary claim is founded upon the two following provisions contained in the act:

"Upon the consummation of said act of consolidation, as aforesaid, all and singular the rights, privileges, exemptions and franchises of each of said corporations parties to the same, and all the property, real, personal and mixed, and all debts due on whatever account to either of said corporations, as well as all stock subscriptions and other things in actions belonging to either of said corporations, shall be taken and deemed to be transferred to and vested in such new corporation" (*Sub-Sec. 12*). "Provided, that nevertheless the privileges, franchises, exemptions and immunities hitherto granted to the Minneapolis & St. Louis Railway Company shall continue to be vested in such new corporation, with the same effect as if originally granted thereto" (*Sub-Sec. 14*).

The intent of these provisions is manifestly to transfer to the new corporation all of the immunities to which any constituent company was entitled *as a corporate body*. Now, even if it were a fact that the shareholders in the Minnesota Western Railroad Company were not subject to the constitutional liability (a proposition that I deny), this condition would not have depended upon any exemption or immunity to which that Company was entitled. If the immunity of shareholders existed, it existed in favor of *the shareholders* of the company by reason of the fact that no competent authority had ever imposed the liability upon them and they, themselves, had not voluntarily assumed it. The immunity depended, if it existed at all, not upon any grant to the corporation, but upon the absence of positive enactment in connection with a rule of law that in the absence of such enactment the shareholders in a corporation are not personally liable for its debts and another (alleged) rule that, in the absence of reserved power so to do, the State cannot after shareholders have made investments upon the faith of such immunity, impose a personal liability upon them without their own consent.

The only other provision of the Act of 1881 which can be claimed to show an intention that the shareholders of a consolidated company formed under it shall be exempt from personal liability for corporate debts is the following, contained in Section 11:

"And the stock of the new corporation * * * shall be deemed and taken as lawful stock and subject only to such further payments, calls or assessments, if any, as may be mentioned in the said consolidation agreement."

It is manifest from the connection in which the provision occurs, as well as from the words chosen, which, it will be noted, do not include the word "liability," that it was the intention of the legislature by this provision to permit the new corporation to make its stock full paid, if it chose, or to provide, in case it preferred, that the stock should be subject to certain further calls or assessments, or to call or assessment in the discretion of its Board of Directors; but there is nothing to indicate that the legislature had in mind the constitutional "double" liability of the shareholders.

I contend, therefore, not only that the constitutional liability attached to, and was assumed and agreed to by, the shareholders of the Consolidated Company *despite* anything contained in the Act of 1881, but that the act contains no indication of an intention to transfer to those shareholders the exemption, if any, theretofore possessed by shareholders in the Minnesota Western Railroad Company.

Indeed, I go farther. The act indicates a positive intent to impose the constitutional liability upon shareholders in any consolidated company organized under it.

Sub-section 11 contained the following:

"And such new corporation * * * *shall be subject to all the restrictions and duties imposed by the laws of this State;*

and Sub-section 14 contains the following:

"All the provisions of the general laws of this State in regard to railroad corporations shall be applicable to any new corporation formed by consolidation under the provisions of this act, except so far as the same shall not be applicable thereto by reason of the situation of portions of its line without this State."

These provisions seem to me to show the plain intention of the Legislature and agreement of plaintiffs in error that the company to be formed and its shareholders should be subject to all the laws of the State that would be applicable to a corporation organized under the general laws of the State or to its

shareholders. One of these is that contained in Section 3, Article X, of the State Constitution.

If this be true, it is immaterial whether the Consolidated Company be distinct from the Minnesota Western Railroad Company, for even though the two companies should be considered the same, the shareholders must be held to have assumed an individual liability for corporate debts to the extent fixed by the State Constitution.

EVEN IF THE SHAREHOLDERS IN THE CONSOLIDATED COMPANY POSSESS ALL THE RIGHTS AND IMMUNITIES POSSESSED BY THE SHAREHOLDERS OF THE MINNESOTA WESTERN RAILROAD COMPANY PRIOR TO THE PASSAGE OF THE ACT OF 1881, THEY ARE NEVERTHELESS LIABLE UNDER THE MINNESOTA CONSTITUTION FOR CORPORATE DEBTS CONTRACTED SUBSEQUENTLY TO THE ADOPTION OF THAT INSTRUMENT.

I.

The Act of 1853 contained the following provision: "The legislature may at any time amend or alter this act" (*Section 22*). This reservation was repealed by the Act of 1870; but while it was still in force the State Constitution was adopted, and that instrument contained this provision: "Each stockholder in any corporation shall be liable to the amount of stock held or owned by him."

We contend that the adoption of this constitutional provision amounted to an amendment of the charter of the Minnesota Western Railroad Company, valid under the reservation contained in the charter, even if the company had then been fully organized and already engaged in the prosecution of its corporate enterprise.

In considering this proposition three questions suggest themselves: First, could a charter such as the one here in question be constitutionally altered by a law of the State, enacted in the exercise of the power reserved, so as to affect the liability of shareholders for debts thereafter contracted? Second, could this be done by constitutional enactment, as

distinguished from legislative enactment? Third, was the constitutional provision here in question intended to apply to special charters such as the one under discussion?

(*First.*) I do not understand whether it is conceded by counsel for plaintiffs in error that, had the charter of the Minnesota Western Railroad Company contained a provision reserving the right to "amend or *repeal*" the charter act, the state could, by appropriate act, have altered the liabilities of shareholders at any time during the period that elapsed prior to the repeal of such provision. In any case, this doctrine is too well established to permit profitable contention to the contrary.

See *In the matter of Oliver Lee & Company's Bank, 21 N. Y., pp. 10 to 13, and 14 to 19.*

This case went to the Court of Appeals of New York on appeal from a final order of the Supreme Court at General Term in a proceeding to enforce the liability of shareholders in Oliver Lee & Company's Bank of Buffalo. This bank had been organized pursuant to the general banking law of 1838, and commenced business in January, 1844. The banking law *provided that the shareholders in banks organized under it should not be subject to any personal liability not voluntarily assumed in their articles of association.* In it, however, the legislature reserved a right to repeal or amend it. The bank failed in 1857, owing debts in excess of five hundred thousand dollars, all of which had been contracted after January 1st, 1850. Subsequently to the organization of the corporation, but prior to the contracting of any of the debts referred to, the constitution of the State of New York had been amended so as to impose a double liability upon shareholders in banks of issue, and in 1849 a statute of the state had been passed to enforce this constitutional provision. It was contended by the defendant shareholders that the provisions of the constitution and that of the act of 1849 should not be held to apply to banking corporations created before the adoption of the constitution, but that if by the true construction of the constitution and statute they did apply to such banks, they were violations of the provisions of the constitution of the United States, by which states are forbidden to pass any law impairing the obligations of contracts. The Court of Appeals overruled these contentions.

The case came to the Supreme Court of the United States, and was decided by this court under the title of *Sherman vs. Smith, 1 Black, 587.* The following quotation embodies the material parts of the decision of this court:

"As this case comes before us under the 25th Section of the Judiciary Act, the only question involved is, whether or not the court below erred in denying a right set up by the plaintiff in error under the constitution of the United States, in other words, whether the constitution of the State of New York, of 1846, or the act of the legislature of 1849, or both, which subjected the stockholders of the bank to personal liability for its debts accruing after the first day of January, 1850, impaired the obligation of any contract with the stockholders in its charter?

"The general banking law of 1838, under which this bank was organized, provided in the 23rd Section, that 'no shareholder of any such association shall be liable in his individual capacity for any contract, debt or engagement of such association, unless the articles of association by him signed shall have declared that the shareholder shall be liable.'

"The 15th Section provided. that 'any number of persons may associate to establish offices of discount, deposit and circulation, upon the terms and conditions, and subject to the liabilities prescribed in this act.'

"One of the articles of association, as we have already seen, provided that the shareholders should not be liable in their individual capacities for any contract, debt, &c.

"The 32d Section of the general banking act provided, that 'the legislature may at any time alter or repeal this act.'

* * *

"Now, in the first place, it is to be observed that the article of association relied on is but an affirmation of the principle contained in the 23rd Section of the act of 1838, and can be entitled to no greater effect or operation than the law itself, unless, indeed, by incorporating it into the articles, it can be made permanent or perpetual."

* * *

"Another view of this question, even assuming that the stipulation of the stockholders in the article of association amounted to a contract, is equally conclusive against the stockholder.

"According to the 15th Section, the association was authorized to establish a bank of discount, deposit and circulation, 'upon the terms and conditions, and subject to the liability prescribed in this act.' It was not competent for the association to organize their bank upon any other terms or conditions, or subject to any other liabilities, than those prescribed in the general charter. Now, the 32d Section, which reserved to the

legislature the power to alter or repeal the act, by necessary construction, reserved the power to alter or repeal all or any one of these terms and conditions or rules of liability, prescribed in the act. The articles of association are dependent upon, and become a part of, the law under which the bank was organized, and subject to alteration or repeal, the same as any other part of the general system."

And this court held that the obligation of the contract between the State of New York and the shareholders of the bank had not been impaired and affirmed the judgment of the New York Court of Appeals.

The following cases are also analogous and many of them upon principle quite as closely in point:

Pennsylvania College Cases, *13 Wall.*, *190*, *pp. 209 to 211*; *212 to 214*; *217 to 221*;
Tomlinson vs. *Jessup*, *15 Wall.*, *454*;
Miller vs. *State*, *15 Wall.*, *478*, *pp. 495 to 499*;
Holyoke Co. vs. *Lyman*, *15 Wall.*, *500*;
Sinking Fund Cases, *99 U. S.*, *700*;
Railway Co. vs. *Philadelphia*, *101 U. S.*, *528*, *pp. 539 and 540*;
Close vs. *Greenwood Cemetery*, *107 U. S.*, *466*;
Spring Valley Water Works vs. *Schottler*, *110 U. S.*, *347*;
Northern Pacific R. R. Co. vs. *Traill County*, *115 U. S.*, *600*;
N. Y. & N. E. R. R. Co. vs. *Bristol*, *151 U. S.*, *556*;
Perrin vs. *Oliver*, *1 Minn.*, *202*;
White vs. *S. & M. R. R. Co.*, *14 Barb.*, *559*;
Hyatt vs. *McMahon*, *25 Barb.*, *457*;
Hyatt vs. *Whipple*, *37 Barb.*, *595*;
Buffalo & N. Y. City R. R. Co. vs. *Dudley*, *14 N. Y.*, *336*;
In the Matter of the Reciprocity Bank, *22 N. Y.*, *9*;
Bailey vs. *Hollister*, *26 N. Y.*, *116*, *117*;
Meadow Dunn Co. vs. *Gray*, *30 Me.*, *547*;
Gardiner vs. *Hope Ins. Co.*, *9 R. I.*, *194*;
West Wis. Ry. Co. vs. *Trempeleau County*, *35 Wis.*, *257*;

Ally. Gen'l vs. *R. R. Cos., 35 Wis., 425, pp. 432, 433, 461, 462; 569 to 579;*
Jeffersonville R. Co. vs. *Gabbert, 25 Ind., 431;*
Union Improvement Co. vs. *Commonwealth, 69 Pa. St., 140.*

The reply made by counsel for plaintiffs in error to the citation of the cases above referred to is that while it may be that under a reservation of the power to "amend *or repeal*" the act of incorporation, the State might have imposed a double liability upon the shareholders of the Minnesota Western Railroad Company, it could not impose such liability under a reservation of the power to "*alter or amend*" which was contained in the Act of 1853. He says the exemption of the shareholders of the Minnesota Western Railroad Company was a corporate franchise; to take this exemption (franchise) away is to repeal the charter *pro tanto;* this can be done only under a reservation of the power to "repeal." Passing for the moment the false assumption that the exemption in question was a corporate franchise, let us inquire whether it is true that to take away this alleged exemption of shareholders by imposing a different (double) liability is a repeal of the company's charter *pro tanto*, in any sense other than that in which every amendment or alteration that is not simply the addition of new matter, is a repeal *pro tanto.* What is meant by to "amend or alter?" "Amend" is defined by the Century Dictionary "properly to improve in expression or detail, but by usage to alter either in construction, purport or principle." "Alter" is defined by the same authority, "to make some change in; make different in some particular; cause to vary in some degree, without an entire change."

In each case the legal sense of the word is identical with that in which it is commonly used. I think it is safe to say that each of these words uniformly conveys the idea of a change, whether by addition, subtraction or substitution, which is not, however, so complete as to make the instrument amended or altered into something essentially new, or as to destroy the instrument altogether. It is evident that this is the meaning attached to the word "amend" by the Supreme Court of Minnesota in such cases as *Ames* vs. *L. S. & M. R. R. Co., 21 Minn., 241,* and *Green* vs. *K. R. F. B. Cor., 35 Minn., 155.*

For a full discussion of this subject, see *Zabriskie* vs. *Hackensack & N. Y. R. Co., 18 N. J. Eq., 178.* In this sense an amendment or alteration of an act dealing with one subject in many details may radically change one detail of the act without changing the purpose or scope or essential effect of the act. Yet, the change, while undoubtedly amounting to a repeal *pro tanto*, is nevertheless an amendment or alteration, and the power to make such change in an act is plainly reserved to the State under a reservation of the power to "amend or alter."

While it is perhaps true that in every one of the cases above cited, the power reserved was that to "amend or repeal," or its equivalent, I believe it will be found in every case, *and that it plainly appears from the context, that it is the power to amend* that had been exercised, that was in question, and upon which the Court relies and upon which it places its decision and not the power to *repeal.* This expressly appears in very many of these decisions. In our case the instrument that was to remain subject to amendment and alteration was the whole charter act. Certainly a change of that act in one particular, by which the shareholders instead of being exempted (if they had been) from all individual liability for the debts of the Minnesota Western Railroad Company, were as to the future, made liable for those debts to a limited extent, falls within the definition of either amendment or alteration.

This conclusion will be borne out by an examination of the following cases, which deal solely with reservations of power such as that which we have under consideration in this case:

State vs. *Granville Alexandrian Soc., 11 Ohio., 1;*
Parker vs. *Metropolitan R. R. Co., 109 Mass., 506;*
Sprigg vs. *Western Telegraph Co., 46 Md., 67.*

The only case cited in the Court below by counsel for plaintiffs in error, in support of an opposite view, that demands any comment is *Ireland* vs. *Turnpike Co., 19 Ohio St., 369,* and a fatal distinction between that case and this is that in the case of the company there under discussion the state possessed no reserve power to amend or alter the constitution of the company.

(*Second.*) Considering it as established, then, that it was competent for the state through the legislature at least, to im-

pose a personal liability for the debts of the company upon shareholders in the Minnesota Western Railroad Company, could this be done by constitutional enactment?

I understand that counsel for plaintiffs in error concede that it may be done in this way.

The reservation contained in the company's charter read:

"The legislature may at any time amend or alter this act."

It is apparent, however, that the word "legislature" was not used in any narrow or technical sense, but to designate the law-making power of the state. Had it been used in any other sense, its reference would have been limited to the legislature *of the Territory of Minnesota* (which derived its authority from the United States), and the power of amendment would have died with the territory. Such an hypothesis is not to be tolerated.

Moreover, a lawful constitutional convention is but a supreme legislature, which, for the time being, supersedes the ordinary legislature. It differs from the ordinary body only in that it does not bear the name "legislature," and that it possesses larger powers, some of which are infrequently exercised. It may, however, and often does legislate upon ordinary matters.

See *Willis* vs. *Mabon*, *48 Minn.*, *140*, *p. 150.*

The legislature, strictly so-called, is but the creature of the constitution, and it would be absurd to say that a power reserved to the legislature could not be exercised by a constitutional convention. What the convention may do by laying its mandate upon the legislature it is creating, it may surely do itself.

Nor do we lack authority to confirm this view. This same question arose in the case of *Oliver Lee & Company's Bank*, *21 N. Y.*, *9.* The Court of Appeals of New York said:

"But it is argued that they (corporate franchises) could not be revoked or altered by a change of the constitution, even if it could be done by the legislature. We have seen that the Supreme Court of the United States has held that a state constitutional provision, acting prejudicially upon a contract, is a law passed by a state impairing its obligation, within the inhibition of the Federal Constitution. This is upon the ground

that the substance of the provision is that the state shall not interfere in any way with the rights which citizens have acquired by contract. It may be said with equal reason, and without any greater departure from the strict meaning of language, that the reservation contained in the laws under which corporations are formed looks to a revocation of the franchises by any legal act which shall possess the force of law, though not strictly an act of legislation."

The question again arose in the case of *The Reciprocity Bank, 22 N. Y., 9*, and was decided in the same way.

(*Third.*) Was the constitutional provision (*Sec. 3, Art. X*) intended to affect shareholders in corporations already existing under special charters that contained no stipulation as to the liability of shareholders?

Such was certainly a part of the *purpose* of the provision. Prior to the adoption of the State Constitution the liabilities of shareholders in corporations, the charters of which were silent upon the subject, had been determined by the general rules of the common law. The purpose of incorporating into the constitution the provision in question was to substitute for the rule of the common law another and different rule, and, naturally, in the absence of any apparent intent to the contrary, it must be presumed that the application of the substituted rule was intended to be at least as broad as had been that of the common law rule.

And certainly the *language* of the provision is broad enough to work this result: "Each stockholder in *any* corporation shall be liable, &c." No distinction is made between corporations formed and those to be formed. Moreover, such a distinction, so far as future debts were concerned, would have been inequitable, and, if unnecessary, unwise. It certainly is not to be presumed to have been intended.

But the meaning of the words "any corporation" is so defined in the constitution itself as to reinforce the conclusion that the words used were intended to possess their natural scope. Sec. 1 of Art. X, of the constitution reads as follows:

"The term 'corporations,' as used in this article, shall be construed to mean *all* associations and joint stock companies, having any of the powers and privileges not possessed by individuals or partnerships, *except such* as embrace banking privileges."

Upon this subject, also the reasoning of the Court of Appeals of New York, in the case of *Oliver Lee & Company's Bank*, *supra*, is helpful and very apposite.

In that case the Court said:

"The first question to be determined relates to the construction of the constitutional provision imposing personal liability upon the stockholders of banks (*Const., Art. 8, Sec. 7*); and the inquiry is whether it is limited to banks thereafter to be created, or applies equally to existing banking corporations. There is nothing in the language which looks to a discrimination between the two classes. It declares generally that the stockholders in every corporation and joint stock association for banking purposes, issuing bank notes, after January 1, 1850, shall be individually responsible, &c. If we look to the apparent object of the provision, no motive can be discovered for confining its operation to future banks. The intention was to protect more adequately the creditors of these institutions, and to take from their proprietors, to a qualified extent, the shield afforded by the corporate personality in which their individual ownership was merged. There were strong reasons for the establishment of a uniform system in this respect, if it could be done without manifest injustice. The existing banks were numerous, and if they were exempted from the principle of personal liability, it would be a long time before it would be generally established. By the general banking law, the associations had the power to prescribe for themselves the duration of their corporate existence, and a long term had generally been named. Hence, if the rule of personal liability only reached the case of future banks, there would continue to be two classes of banking institutions for many years to come. The defendants' counsel insists that we should not construe the clause so as to disturb vested interests unless compelled by language which would not admit of any other meaning. But we are not to interpret the constitution precisely as we would an act of the legislature. The convention was not obliged, like the legislative bodies, to look carefully to the preservation of vested rights. It was competent to deal, subject to ratification by the people and to the constitution of the Federal Government, with all private and social rights, and with all the existing laws and institutions of the state. * * * When, therefore, we are seeking for the true construction of a constitutional provision, we are constantly to bear in mind that its authors were not executing a delegated authority, limited by other constitutional restraints, but are to look upon them as the founders of a state, intent only upon establishing such principles as seemed best calculated to produce good government and promote the public happiness, at the expense of any

and all existing institutions which might stand in their way. * * * When, therefore, we read in the provision under consideration that the stockholders of every banking corporation shall be subject to a certain liability, we are to attribute to the language its natural meaning, without inquiring whether private interests may not be prejudiced by such a sweeping mandate. * * *

See, also,

*In the Matter of the Reciprocity Bank, 22 N. Y., 9; Cooley's Constitutional Limitations (5th Ed.), p. 73, p. *61.*

All the reasoning of the Court of Appeals of New York applies with equal force to the case at bar. To have confined the liability to *future* corporations would, in practical effect, have postponed the realization of any considerable benefit from the provision to a time far removed in the future. Certainly the legislature did not intend such to be the result.

The words of the constitution are entitled to their full significance, and this being granted, they include all corporations then existing or thereafter to exist, under the sanction of the state sovereignty. It would have been inequitable to the shareholders of corporations created after the adoption of the state constitution, as well as to creditors of those previously created, had not the provisions of the constitution been made to apply to all existing corporations to which they could be applied, and to the fullest extent possible.

And see, as bearing decisively on this question, the following cases :

Tomlinson vs. *Jessup, 15 Wall., 454 ;*
Holyoke Co. vs. *Lyman, 15 Wall., 500 ;*
Ry. Co. vs. *Phila., 101 U. S., 528 ;*
Spring Valley Water Wks. vs. *Schottler, 110 U. S., 347 ;*
N. Y. & N. E. R. Co. vs. *Bristol, 151 U. S., 556 ;*
Gardner vs. *Ins. Co., 9 R. I., 194 ;*
Hyatt vs. *McMahon, 25 Barb., 457;*
Union Impt. Co. vs. *Com., 69 Pa. St., 140 ;*
Parker vs. *Metr. R. R. Co., 109 Mass., 506;*
State vs. *G. A. Soc., 11 Ohio, 1 ;*
Jeffersonville R. Co. vs. *Gabbert, 25 Ind., 431 ;*
Sprigg vs. *Western Tel. Co., 46 Md., 68.*

For the rule that general laws, when the intention so to do appears or can be fairly gathered, operate as amendments or modifications of special acts of incorporation,

See

Endlich on the Interpretation of Statutes, Secs. 231 and 232;

2d Morawetz on Corporations, 2d Edition, Sec. 1110;

Bangor, Old Town & Milford Railroad Co. vs. *Smith, 47 Maine, 34;*

Roxbury vs. *The Boston Providence Railroad Cor., 6 Cushing, 424;*

Prince vs. *St. Paul, 19 Minn., 267;*

State vs. *Kline, 22 Minn., 328.*

The two cases upon which counsel for plaintiffs in error mainly relies upon this branch of the case are *Robertson* vs. *Sibley, 10 Minn., 323*, and *St. Paul* vs. *S. P. & S. C. R. R. Co., 23 Minn., 469.*

Robertson vs. *Sibley, 10 Minn., page 323*, was an action by the Sheriff of Ramsey County to reduce to possession certain moneys alleged to be owing as a stock *subscription* to the Minneapolis & Cedar Valley Railroad Company, a judgment debtor, and was brought under the provisions of Subdivision 4, Section 156, of the Public Statutes, Minnesota, page 553, authorizing the levy upon such debts. *It was not contended that the sheriff obtained any right to recover by virtue of the constitutional provisions* or of general laws of the state applicable to corporations or their stock. The charter of the Minneapolis & Cedar Valley Railroad Company was a special act of the territorial legislature passed in 1856, which contained no provision with reference to the liability of shareholders. Sec. 17 of the act declared it to be a public act "and may be amended by any subsequent legislative assembly in any manner not impairing or destroying the vested rights of said corporation, and shall be favorably construed in all legal and equitable proceedings for the accomplishment of the objects intended." The statement in the court's decision, relied upon by defendants' counsel, that since it was incorporated during "our territorial existence" by special act of the legislature, it does not come within the provisions of the state constitution relating to cor-

porations, was entirely unnecessary and absolutely disconnected in any way with the decision of the case. The words were beyond doubt, inconsiderately used. Reference was evidently intended to the fact that it was incompetent for the state, through its constitution, to interfere with vested rights.

In *St. Paul* vs. *The St. Paul & Sioux City R. R. Co., 23 Minn., 469*, the facts were the following:

Lots of the defendant, in the City of St. Paul, were assessed by the municipal officers for the benefits conferred upon them by the grading of a certain street, the assessments being made under the provisions of the municipal charter. Upon non-payment, the city applied for judgment, and a stipulation between the parties was entered into, by which it appeared that the defendant company existed under an act of March 2, 1855, to incorporate the Root River Valley & Southern Minnesota Railroad Company, and other acts; that it had constructed and put into operation, and owned and operated, and for more than seven years had owned and operated, that is to say since a time prior to the adoption of the municipal charter, a continuous line of railroad, more than sixty miles in length, within the State of Minnesota; that the property assessed was in its actual occupation for railroad purposes; that the defendant had fully complied with all the acts constituting its charter. The exemption from taxation, claimed by the defendant, was contained in its original charter act, and in an amendment thereto passed in 1864. The exemption was expressly granted by these acts. No right to amend or repeal the charter was, apparently, reserved. It was held, and properly, that in such a case the provisions of the constitution as to taxation could not apply because the subject was *expressly treated and settled* in a prior contract between the state and the railway company. This case certainly has no pertinence to the subject of present discussion.

It should be noted that there is no question of giving a retroactive effect to the constitutional provision under discussion. I do not claim that the constitution operates, or was intended to operate, upon debts created prior to its adoption, but that it was intended to, and does, operate upon debts thereafter created by every corporation with which any express and inconsistent charter contract did not then exist.

I have, then, I believe, established these propositions:

(1) The state, at the time of the adoption of the state constitution, had power constitutionally to impose a double liability upon the shareholders of the Minnesota Western Railroad Company.

(2) It had the power to do this by an appropriate provision incorporated in the state constitution.

(3) A provision to this effect, applicable to this company as well as to others, was incorporated in that instrument and has always since remained a part of the constitution.

II.

By reason of legislation of the State, accepted by the Minnesota Western Railroad Company, under which that company now exists, if at all, the company became, with its consent and that of all its shareholders, a State corporation and its stock became subject to the double liability imposed by the State constitution upon State corporations.

At the time of the passage of the act authorizing the organization of the Minnesota Western Railroad Company by the territorial legislature, there was no law in force in the territory imposing a double liability upon shareholders in corporations. Consequently, if the Minnesota Western Railroad Company had gone into business immediately after the passage of that act its shareholders would not, up to the time of the adoption of the State constitution, have been individually liable upon their stock.

Counsel for plaintiffs in error contends that the State could not, subsequently to any action by the Minnesota Western Railroad Company that amounted to even the most formal acceptance of its charter, increase the liability of shareholders to creditors, even though the corporation had not in any way, at the time of such action by the State, undertaken the prosecution of the public enterprise for which it had been organized.

The only acceptance shown (and this was not found to be a fact by the court below) was a formal organization of the company in 1857. But assume, for the sake of argument, that plaint-

iffs in error have established a formal acceptance of the Act of 1853 by the corporators named therein, and that the reservation of the right to amend or alter the charter did not authorize an increase of the liability of shareholders. What is the result?

Prior to the actual inception of the *corporate enterprise* of the Minnesota Western Railroad Company, or the contracting of any debts upon its account, or, so far as it appears, the investment of anything in its securities, the company had ceased to have any right to proceed under the authority conferred by the territorial act (its original charter). When it actually began operations—*in fact, when it permanently really organized*—it was under the sanction and by virtue of an enabling act of the *State* sovereignty; that is to say, the Act of 1869. By that act, the charter of the Minnesota Western Railroad Company, *being then subject to forfeiture at the pleasure of the State*, the company was completely reconstituted, given new life and new powers. The original authority of the incorporators of the Minnesota Western Railroad Company was entirely changed. New corporators were added to the original list; different people were authorized to control the matter of stock subscriptions; the route of the proposed road was changed; the conditions precedent to the vesting in the company of the rights granted were entirely altered; and, in order more distinctly to denote the change in the source of the power conferred and to characterize the acts performed by the company as acts performed under the sanction of the State, this act provided that the word "State" should be substituted for the word "Territory" wherever it occurred in the act of incorporation, save in the enacting clause.

While this may not have amounted in legal effect to the creation of a new corporation, the act certainly withdrew from the original incorporators the rights conferred by the Acts of 1853 and 1855, and conferred upon the persons named in those acts, together with others, that is upon a new set of men, some of the rights originally conferred, together with new rights. This Act of 1869 was accepted and acted upon by the Minnesota Western Railroad Company; thereby the right of the old incorporators to object to the changes thus made was waived, and the changes became effectual and binding. *All the subsequent rights and acts of the Minnesota Western Railroad*

Company, as well as all the rights of its shareholders, were and are founded upon this Act of 1869 and the other acts of the state subsequently passed. After the passage of this act it would not have been possible for the persons named as incorporators in the Acts of 1853 and 1855 to proceed alone, or to enjoy any of the rights granted by those acts, except as the same were modified by the conditions prescribed in the Act of 1869 ; in other words, the corporation has actually prosecuted its corporate enterprise solely under the sanction of the laws of the state.

See *Ames* vs. *L. S. & M. R. R. Co., 21 Minn., pp. 289 to 291.*

See, also, for a very lucid discussion of the effect of such a condition :

Shields vs. *Ohio, 95 U. S., 319.*

Now, as we have seen, the *state* could not by its voluntary act either create a corporation, or enable a corporation to exercise its powers and do business without the constitutional liability *ipso facto* attaching to the stock of the corporation. A corporation cannot, I submit, derive its powers and authority from the state without becoming in substance a state corporation and submitting itself to the laws of the state and the obligations thereby imposed. In Minnesota, one of such obligations is, and always has been, the liability of shareholders to respond to creditors in the manner and to the extent prescribed by the constitution.

III.

No rights under the charter of the Minnesota Western Railroad Company became vested in it or its shareholders prior to the adoption of the state constitution and consequently when that company entered upon its business career, the constitutional liability attached to its stockholders.

The Minnesota Western Railroad Company did not enter upon its corporate enterprise prior to the adoption of the state constitution. It was not until after 1869, when the constitution had been in force more than ten years, that, so far as appears, it *received payment* upon any subscriptions to its

stock or contracted any debts. It definitely appears that it was not until after 1869 that it was finally organized or laid out its line of road, or did anything whereby there arose in its shareholders or its creditors any vested interest in the rights granted to it by the legislature. Prior to that time no one had done anything or invested anything upon the strength of that act.

Now, the doctrine that the immunity of the shareholders of a corporation from corporate debts can not be taken away by subsequent legislative enactment is but a branch of the doctrine of vested rights. So long as the rights granted by the legislature to a corporation have not become vested by exercise or by the doing of something toward the accomplishment of the public benefit intended, the act of incorporation remains merely an offer, subject to be withdrawn or altered.

Upon this subject see *Pearsall* vs. *Great Northern Ry. Co.*, *161 U. S., 646* (*pp. 659 to 665; 666 to 671; 672 to 674, and p. 677*), which goes much farther than the doctrine stated.

I think it will be found that in every well considered case sustaining the docrine that a corporate charter (when unilateral) is an irrevocable contract, the charter had been not only accepted but *acted on* in pursuance of the intent of the grant.

By the adoption of the Minnesota Constitution the people of that State enacted that each shareholder in every corporation shall be liable for its debts to the extent of the amount of stock held or owned by him. The provision was self-executing. (See *Willis* vs. *Mabon*, *48 Minn.*, *140*, and *McKusick* vs. *Seymour, Sabin & Co*, *48 Minn.*, *158.*) To this enactment there were no exceptions except in the case of manufacturing and mechanical corporations and such exceptions as were implied by law, *i. e.*, those created by the application of the docrine of vested rights. But, upon the principle above stated, no rights of any description had at that time become vested in the Minnesota Western Railroad Company or in its shareholders. The constitutional provision, therefore, entered into and thenceforth qualified the charter of the railway company, When (about 1870) the company actually entered into business, made investments and built road, every person that invested a dollar in it, or accepted a share of its stock, did so upon the condition that he should be personally

liable for the debts of the company to an amount equal to the par value of his stock.

For a case which in principle is in point, see *Matter of Empire City Bank, 18 N. Y., 199.*

To put the same thing in another way. The Minnesota Western Railroad Company did not act on the offer of the state until after the constitution had intervened. The provisions of that instrument changed the terms of the offer. The company accepted the offer as modified and its shareholders must abide by the contract actually made.

IV.

Even if the Minnesota Western Railroad Company had been organized and had begun business prior to 1858, and no reservation of the right to amend it had been contained in its charter, the adoption of the State Constitution would have operated to impose a double liability upon its shareholders for all debts of the company THEREAFTER CONTRACTED.

The act of incorporation of this company *did not include any express exemption of the shareholders from double liability.* The exemption, if it may be called such, existed merely by reason of the existence of the rule of law that, in the absence of special provision, the shareholders in a corporation are not individually liable for its debts. The act of incorporation contained no guaranty that this immunity would continue. If any person had become a shareholder in the corporation, there being no special provision upon this subject, he would have done so with a knowledge that his rights, as such shareholder, were fixed by the common law of the State; but that this law was subject to change by legislative or constitutional enactment, and that the silence of the act of incorporation was no guaranty upon the part of the legislature that there would not be substituted, at some future time, for the rule of law existing at the time of the passage of the act, some general statutory provision making all shareholders in corporations liable to some extent for the debts *thereafter contracted* by their respective companies. It should follow that even if the act incorporating the Minnesota Western Railroad Company had

not contained a reservation of the right to amend it, it would have been competent for the people, through an amendment of the constitution, to impose upon the shareholders in that corporation (if there had been any), in common with the shareholders in all other Minnesota corporations, a personal liability for the *future* debts of the companies in which they held stock respectively. *A fortiori*, it was competent to impose a liability for future debts upon future shareholders.

Counsel for plaintiffs in error contends that the rule of law existing at the time of the making of a contract enters into it, and quotes cases holding that the statutes regulating redemptions from mortgage foreclosures enter into the mortgage contract. But he forgets that the contract into which the *general* law as to shareholders' liability enters (that is to say, the contract had in view by the general law.) is not that between the corporation and the shareholder or that between the shareholder and the State, but that between the corporation and its creditors. I do not contend that the constitution affects contracts between the corporation and its creditors made prior to the adoption of the constitution, but that, the general rule having been changed, the new rule enters into all subsequent contracts. The shareholders of this company had no contract out of which arose a right to insist that their contracts with creditors of the corporation should for all time be governed by one rule of general law.

See,

Anderson vs. *Cowes. 18 Gratt, 295;*
Stanley vs. *Stanley, 26 Me., p. 196;*
Coffin vs. *Rich, 45 Me., pp. 508-10;*
Hathorn vs. *Calef, 53 Me., 471, pp. 482-4;*
Sleeper vs. *Goodwin, 67 Wis., 577, pp. 580-2; 589.*

There is, of course, no question that the state constitution did change the general rule of law upon the subject of the personal liability of shareholders, and that by its terms no corporation (except manufacturing and mechanical companies), was or is excepted from the operation of the provision. (*Constitution, Art. 10, Secs. 1 and 3.*) Such being the case, it follows that had there been shareholders in the Minnesota Western Railroad Company at the time of the adoption of the constitution, they would thereupon have become subject to a

double liability for all debts of the company thereafter contracted. *A fortiori* the persons who thereafter organized the company and, with the constitution staring them in the face, issued and subscribed for its stock, and those who succeeded them as shareholders, were subject to that liability. Moreover, such a change in the responsibility of shareholders is not such a change in the powers, privileges or franchises of the corporation as would render it incapable, or disable it to prosecute the enterprise for which it had been chartered, and unless a change be thus fundamental, it is competent for the legislature to make it.

See

Pearsall vs. *Great Northern Ry. Co.*, *161 U. S.*, *646.*

It appears, then, that even if it should be determined that the Consolidated Corporation is identical with the Minnesota Western Railroad Company, its shareholders and, therefore, plaintiffs in error, are nevertheless liable to the extent of an amount equal to the par value of the stock held or owned by them for the debts of the Company. It follows that whether this Court agrees or disagrees with the construction placed upon the Act of 1881 by the Supreme Court of Minnesota or with the conclusions drawn by that Court from the results of that construction, the judgment entered below must be affirmed, if the writ of error be not dismissed.

F. W. M. CUTCHEON,
Counsel for Defendant in Error.

APPENDIX A.

SPECIAL LAWS, MINNESOTA, 1869, CHAPTER 117.

An Act to Amend An Act entitled "An Act to Incorporate the Minnesota Western Railroad Company," passed March third, one thousand eight hundred and fifty-three.

Be it enacted by the Legislature of the State of Minnesota:

SECTION 1. That section two of said act is hereby amended so as to read as follows:

SEC. 2. The said corporation is hereby empowered to cause such examination or surveys to be made as shall be necessary to ascertain the most advantageous route whereon to construct a railroad, and shall cause an estimate to be made of the probable cost thereof; and the said corporation is hereby invested with full power and right to construct and run a railroad with one or more tracks from Stillwater, on Lake St. Croix, thence running to the city of St. Anthony, on the Mississippi River, thence across the said last named river, via the City of Minneapolis, to a convenient point of junction with the Minnesota Valley Railroad, or the Hastings and Dakota Railroad, or both, as the said company may select, with a branch to the Red River, via Kandiyohi, to a point to be selected on said river, and also a branch running to a point to be selected on the St. Louis River, if deemed advisable by said company.

SEC. 2. That section four of said act be, and the same is, hereby amended by striking out the following words in the first line, "the above named persons," and inserting in place thereof, Franklin Steele, R. P. Russell, William Holcomb, Frederick Schulenberg.

SEC. 3. That whenever the word "Territory" occurs in said act except in section one, the same be stricken out and the word "State" inserted in lieu thereof.

SEC. 4. The said Minnesota and Western Railroad Company

shall commence the construction of said road within three years from the passage of this act.

SEC. 5. This act shall take effect and be in force from and after its passage.

SEC. 6. Section four of an act entitled an act to amend an act entitled an act to incorporate the Minnesota Western Railroad Company, approved February twenty-sixth, one thousand eight hundred and sixty-five, is hereby repealed.

SEC. 7. That section one of said last named act be amended by adding after F. R. Delano, George Faber and Daniel L. Howe.

Approved March 5, 1869.

APPENDIX B.

Special Laws, Minnesota, 1870, Chapter 57.

An Act to Amend An Act entitled "An Act to Incorporate the Minnesota Western Railroad Company," approved March third, one thousand eight hundred and fifty-three, and the acts amendatory thereof.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. That section one of an act entitled "An act to amend an act entitled an act to incorporate the Minnesota Western Railroad Company, passed March the third, one thousand eight hundred and fifty-three," which was approved March fifth, one thousand eight hundred and sixty-nine, is hereby amended by inserting after the words "may select" the words "and from the point of junction with said first named road to the north line of Iowa."

Sec. 2. Section two of said act approved March fifth, one thousand eight hundred and sixty-nine, is hereby repealed.

Sec. 3. Section thirteen of said act approved March third, one thousand eight hundred and fifty-three, is hereby amended by striking out the word "fifteen" and inserting instead "twenty-five."

Sec. 4. Section fourteen of said act of March third, one thousand eight hundred and fifty-three, is hereby amended so as to read as follows:

(Here follow elaborate provisions with reference to the condemnation of right of way.)

Sec. 5. Section twenty-one of said act, approved March third, one thousand eight hundred and fifty-three, is hereby amended by adding at the end thereof the following words: And said company may by a resolution of its board of directors change the name of said company and adopt any suitable name by which said company shall in future be known, and may designate the name by which any branch line shall be known, to take effect after public notice of such change shall be given for one month in any daily paper published at the city of Minneapolis, but such change of name shall not affect any

rights or liabilities of said company under any former name. And said company shall have power to create and issue in such manner and on such terms as it may deem expedient, one or more classes of preferred stock and special stock, and to make such agreements as it may deem proper with the respective holders thereof, as to the dividends thereon, and the securities for such dividends; and to make such agreements as it may deem proper with the holders of any such special stock for the appropriation of the net earnings of any portion of the railroad which it may construct or otherwise acquire to the payment of dividends on such special stock as may be issued in respect thereto, which appropriation, as made by such agreement, shall be effectual to secure to the said and future holders of such stock, the application of such net earnings as in the said agreement provided against any future act of the company or any of its general liabilities. And the said company may make such agreements as it may deem proper with the holders of any such special stock as to the construction and administration of the portion of said railroad to which said stock may pertain; and for the separate organization of the holders of such special stock for the purpose of that construction and administration, and enabling them or directors chosen by them, separately or in conjunction with the other directors, to exercise in respect to the portion of the road to which such special stock may pertain, all the powers of the company, subject to the provisions of such agreement when made and entered into. *Provided*, That in consideration of an annual payment of a per centum (as provided in this section) by said corporation as aforesaid, the railroad, its appurtenances and appendages and all other property, estate and effects of said corporation, which by the provisions of this act contained, said corporation is to acquire, purchase, hold, possess, enjoy or use for, in or about the construction, equipment, renewal, repair, maintaining or operating its railroad, as also the stock and capital of said company, shall be and hereby are forever exempt from all taxation and from all assessments; and in consideration of the grants made to, and the privileges and franchises conferred upon the company hereby created, and of the exemption contained in this section, the said company shall, during the first three years after thirty miles of said railroad shall be completed and in operation, on or before the

first day of March of each and every year, pay into the treasury of the State, one per cent. of the gross earnings of said railroad, the first payment to be made on the first day of March next after the said railroad shall be completed and in operation, and shall during the seven years next ensuing after the expiration of the three years aforesaid pay into the treasury of this State on or before the first day of March of each and every year, two per cent. on the gross earnings of said railroad, and shall from and after the expiration of ten years from the completion of thirty miles of said railroad, on or before the first day of March of each and every year, pay into the treasury of this State three per cent. of the gross earnings of said railroad; and the payment of such percentum annually as aforesaid, shall be and is in full of all taxation and assessment whatever. And for the purpose of ascertaining the gross earnings aforesaid, an accurate account of such earnings shall be kept by said company, an abstract whereof shall be furnished by said company to the treasurer of this State, on or before the first day of February in each year, the truth of which abstract shall be verified by affidavits of the treasurer and secretary of said company; and for the purpose of ascertaining the truth of such affidavits, and the correctness of such abstract, full power is hereby vested in the Governor of this State, or any other person appointed by law prescribed, to examine under oath, the officers and employees of said company or other persons; and if any person so examined by the Governor or other authorized persons, shall knowingly or wilfully swear falsely concerning the matter aforesaid, every such person is declared to have committed perjury. And for securing to the State the payment of the aforesaid percentum, it is hereby declared that the State shall have a lien upon the railroad of said company, and upon all the property, estate and effects of said company whatever, real, personal or mixed, and the lien hereby secured to the State, shall take and have precedence of all demands, decrees and judgments against said company.

SEC. 6. Section twenty-two of said act, approved March third, one thousand eight hundred and fifty-three, is hereby repealed. *Provided*, that the said company shall carry, and the rights and privileges hereby granted are upon the express condition that the said company shall always carry freight and

passengers over their main road and branches at just and reasonable rates.

SEC. 7. This act shall effect and be in force from and after its passage.

Approved, February 4, 1870.